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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RICHARD F. KELLEY,

Plaintiff and Appellant,

v.

SANJAY BIHARI KUKREJA et al.,

Defendants and Respondents.

B158936

(Los Angeles County
Super. Ct. No. NC027826)

APPEAL from an order of the Superior Court of Los Angeles County. J. D. Lord,
Judge. Reversed with directions.

Law Offices of Michael F. Shapiro, Michael F. Shapiro and Patricia A. Painter for
Plaintiff and Appellant.

John L. Fort for Defendants and Respondents.

Richard F. Kelley appeals from the order of the superior court granting the motion by Bihari Kukreja and Madhu B. Kukreja for attorneys' fees pursuant to Government Code section 12965, subdivision (b). He contends, inter alia, the trial court's failure to make express written findings to support its award of attorneys' fees requires that the award be reversed and that on this record no findings could reasonably be made that the housing claim was frivolous, meritless, vexatious or unreasonable.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On July 25, 2001, Richard F. Kelley filed in superior court a first amended complaint against Sanjay Kukreja, Bihari Kukreja and Madhu Kukreja for specific performance of a contract to sell real property, for damages and for housing discrimination. Kelley alleged in the first cause of action, in essence, that he and Sanjay Kukreja had entered into a contract for the sale of Kukreja's home at 4864 Fidler Avenue in Long Beach for the sum of \$259,000 and that Sanjay Kukreja repudiated the contract and has failed and refused to complete the sale of the property. The second cause of action alleged that Bihari Kukreja, Madhu Kukreja and Sanjay Kukreja's parents, own and live in a residence adjacent to the subject property and that they, as managing agents, and Sanjay Kukreja, as owner, canceled the contract for the sale of the subject property to Kelley upon learning that Kelley was an African-American.

On January 2, 2002, Bihari Kukreja and Madhu Kukreja filed a motion for summary judgment as to the sole claim against them, the second cause of action for housing discrimination. They asserted that Kelley had failed to exhaust administrative remedies, failed to allege receipt of a right to sue letter from the Department of Fair Employment and Housing and that as a matter of law, the encounter between Kelley and Madhu Kukreja on April 11, 2000, was insufficient to support Kelley's discrimination claim.

Defendants filed their declarations in support of the motion for summary judgment to the effect that Sanjay Kukreja had decided not to sell the subject property upon learning from his tax advisor that such a sale would subject him to approximately

\$30,000 in taxes and that neither Bihari Kukreja or Sanjay Kukreja were informed of Kelley's race prior to his filing of the first amended complaint.

Kelley filed opposition to the motion for summary judgment. In his declaration, he stated that during an inspection of the subject property he was introduced to Madhu Kukreja who was identified as the owner of the property and she "looked at [him] with a startled sort of look on her face as [he] extended [his] hand to shake hands with her. She very reluctantly and quickly shook [his] hand, and quickly left the Property." He learned several days later that the seller wanted to terminate the escrow on the property.

The trial court granted the motion for summary judgment and in response to Kelley's inquiry of the basis for the court's decision, the court stated it was "not too sure that the right-to-sue issue is as nonapplicable as you believe. [¶] And secondarily, maybe more importantly, it's just hard for me to see the suit against the nonowners of the property for the failure of another person -- I recognize it's the son and stuff like that, but for another person to decide to sell or not to sell their house."¹

On February 4, 2002, the trial court signed the order on summary judgment and findings of fact wherein it stated it found "as a matter of law no triable issues of material fact exist regarding plaintiff's housing discrimination claims against defendants Bihari Kukreja and Madhu B. Kukreja. The evidence submitted by plaintiff and relied upon by this Court consists of one meeting between the plaintiff and defendant Madhu B. Kukreja, in which plaintiff contends that: (1) Madhu B. Kukreja's handshake was 'reluctant' and 'quick'; (2) Madhu B. Kukreja had a 'startled' or 'shocked' look on her face; (3) Madhu B. Kukreja quickly left the place where the meeting took place; (4) the plaintiff is African-American; and (5) Madhu B. Kukreja's son who holds title to the real property in question refused to sell the property to the plaintiff. The Court finds as a

¹ Sanjay Kukreja had filed a motion to join in the motion for summary judgment and the trial court deemed it a "motion to reconsider" and "put [it] over for a month, to allow a response to the motion as the court now deems it."

matter of law, that these facts are insufficient for plaintiff to meet his burden in the context of a housing discrimination claim.”

On February 19, 2002, Kelley filed objections to the order submitted by Bihari Kukreja and Madhu Kukreja, submitted a proposed modified order, and requested a hearing on objections to the order on summary judgment and findings of fact. Also on this date, Kelley filed a request for dismissal of the second cause of action as against Sanjay Kukreja.

On February 19, 2002, Bihari Kukreja and Madhu Kukreja filed a motion for attorneys’ fees in the sum of \$12,736.50 pursuant to Government Code section 12965, subdivision (b) on the grounds that Kelley’s action “was frivolous, unreasonable and meritless, entitling defendants as the prevailing party to an award of attorneys’ fees.”² Additionally they submitted a memorandum of costs, which included the above-stated attorneys’ fees, in the total amount of \$14,375.50. Attorney Steven J. Zipperman, counsel for Bihari and Madhu Kukreja, filed his declaration wherein he stated “A total of fifty six and a quarter (56.25) hours of attorney time were spent working on all aspects of this case, from filing of the original Answer to the hearing on the Motion for Summary Judgment. This total includes an estimate of three (3) hours anticipated to drive to the hearing of this motion and participate in the hearing of this matter. [¶] . . . I calculated the total amount of attorneys fees which the defendants Kukreja either have paid and/or are obligated to pay to my firm as follows: [¶] 56.25 hours X \$250.00/hour=\$14,062.50 [¶] Thus, total of Fourteen Thousand Sixty Two Dollars and Fifty Cents (\$14,062.50) in attorneys fees are claimed by defendants Bihari Kukreja and Madhu B. Kukreja in the accompanying Motion for Attorneys Fees.”~(CT 518)~

On March 11, 2002, Kelley filed opposition to the motion for attorneys’ fees~(CT 537)~ on the ground that Government Code section 12965, subdivision (b) was not the

² On March 1, 2002, they filed an amended notice of motion and motion for attorneys’ fees pursuant to Government Code section 12965, subdivision (b) in the amount of \$14,062.50.

applicable statute, that Kelley's action was not frivolous or without merit and that defendants had not submitted adequate evidence regarding the amount of reasonable and necessary attorneys' fees incurred in the defense of this action.

Defendants argued that they believed they were right and had not discriminated against anyone. Defendants' counsel offered copies of his specific invoices if the court needed more specificity as to the billing. Plaintiff argued that the specific code section under which the motion was brought did not apply to a housing discrimination action, that housing discrimination statutes were separate and distinct from employment discrimination statutes. Plaintiff conceded there were specific code sections in housing discrimination cases authorizing attorneys' fees. Plaintiff argued though that even if the motion had been brought under the correct statute, defendants would not be entitled to attorneys' fees. Plaintiff argued "in a statutory civil rights type case, the court has made it very clear that a prevailing defendant may not recover attorneys' fees simply because they prevail. They can only recover those attorney fees upon a showing that the case was frivolous, and meritless, and totally unreasonable." Plaintiff argued that the facts of this case demonstrated that the two particular defendants, although not title owners of the property, controlled all of the decisions that had been made with regard to the property for the entire time their son owned it. The statutory scheme specifically provides that anyone who assists, aides, abets or conspires with someone else to discriminate in the housing situation can be equally liable, providing both a factual and legal basis for the claim.

The court took the matter under submission and on April 2, 2002, by way of a minute order granted the motion for attorneys' fees and costs in the sum of \$15,773.50 in favor of defendants Bihari Kukreja and Madhu Kukreja and against plaintiff Kelley.³

³ On August 23, 2002, the trial court entered judgment in favor of Kelley and against Sanjay Kukreja following a court trial on Kelley's claim for specific performance and this judgment is the subject of a separate appeal and not directly relevant to the issues raised in the present appeal.

DISCUSSION

“Orders denying or granting an award of attorney fees are . . . generally reviewed using an abuse of discretion standard of review. [Citation.] But a ‘determination of whether the criteria for an award of attorney fees and costs have been met is a question of law.’ [Citation.]” (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.)

“In *Cummings v. Benco Building Services*,⁴ [this court] explained the standards to be applied in determining the propriety of an attorney fees award under the employment discrimination statutes: ‘Attorney fees are allowable as costs to a prevailing party when authorized by statute. [Citations.] Government Code section 12965 authorizes an award of attorney fees and costs to the prevailing party in any action brought under the California Fair Employment and Housing Act (FEHA). That section provides in pertinent part: “In actions brought under this section, the court, in its discretion may award to the prevailing party reasonable attorney fees and costs except where such action is filed by a public agency or a public official, acting in an official capacity.” [¶] The language, purpose and intent of California and federal antidiscrimination acts are virtually identical. Thus, in interpreting FEHA, California courts have adopted the methods and principles developed by federal courts in employment discrimination claims arising under title VII of the federal Civil Rights Act, 42 United States Code section 2000e et seq. . . . [Citations.] A trial court’s award of attorney fees and costs under the section is subject to an abuse of discretion standard. [Citations.]’ [¶] We further noted ‘The standard a trial court must use in exercising its discretion in awarding fees and costs to a prevailing defendant was set forth in the Supreme Court’s decision in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412.’ In *Christiansburg*, the Supreme Court held a prevailing plaintiff in an antidiscrimination case “‘should ordinarily recover an attorney’ [sic] fee unless special circumstances would render such an award unjust. [Citation.]”’ However, it declined to use a similar standard in determining whether to

⁴ *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383.

award attorney fees to a prevailing *defendant*, because ‘there are at least two strong equitable considerations counseling an attorney’s fee award to a prevailing Title VII plaintiff that are wholly absent in the case of a prevailing Title VII defendant. [¶] First, . . . the plaintiff is the chosen instrument of Congress to vindicate “a policy that Congress considered of the highest priority.” [Citation.] Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. . . . “these policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant.” [Citation.] A successful defendant seeking counsel fees . . . must rely on quite different equitable considerations.’ It cautioned, however, ‘In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.’ [¶] The *Christiansburg* court concluded ‘a district court may in its discretion award attorney’s fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.’ In *Cummings*, we agreed and cautioned ““such awards should be permitted ‘not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.’”” (*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 864-866.)

As in *Rosenman v. Christensen, Miller et al.*, the trial court here failed to make any findings as to the existence of the *Cummings/Christiansburg* criteria. As we noted in *Cummings*, such findings are necessary where a trial court awards attorney fees to a successful FEHA defendant. (*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, supra*, 91 Cal.App.4th 859, 867.)

In *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, supra*, 91 Cal.App.4th 859, 868, we imposed “a nonwaivable requirement that trial courts make

written findings reflecting the *Christiansburg/Cummings* standard in every case where they award attorney fees in favor of defendants in FEHA actions.” As we stated, requiring such findings “will go a long way towards limiting defendants’ receipt of attorney fees awards to the extreme cases envisioned by *Cummings* and *Christiansburg*.” (*Ibid.*) Upon this basis alone, the order awarding attorneys’ fees must be reversed.

Moreover, even if we infer findings to support the award of attorney fees, our review of the record reveals no substantial evidence to support a finding that Kelley’s actions were frivolous, unreasonable, or groundless. While much was made at the trial level about the brief nature of the encounter between Kelley and Madhu Kukreja and the fact that a “shocked expression” or reluctant handshake should not be the basis of a discrimination claim, the alleged discriminatory act was not the lack of warmth in the greeting but the fact that after this first meeting the seller thereafter refused to sell the property to Kelley, an African-American. Additionally, under the words of the statute, it is unlawful “[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so.” (Gov. Code, § 12955, subd. (g).) The statute does not limit liability to only the owners of the property and could potentially have formed the basis of liability against Bihari and Madhu Kukreja. Because we conclude Kelley’s housing discrimination claim cannot be deemed frivolous, unreasonable or groundless, we further conclude the award of fees and costs to defendants was an abuse of discretion.

DISPOSITION

The order awarding attorneys’ fees and costs to Bihari Kukreja and Madhu Kukreja and against Kelley is reversed and remanded to the trial court with directions to deny the request for fees and costs. Appellant shall recover his costs of appeal.⁵

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⁵ The motion by appellant to take judicial notice of the statement of decision of the trial court in this action and the judgment after court trial, which are not the subject of this appeal, which occurred after the present appeal was filed and which do not directly relate to the present issue on this appeal, is denied.

MUÑOZ (AURELIO), J.*

We concur:

PERLUSS, P. J.

JOHNSON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.